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No. 95-761

In The

Supreme Court of the United States

October Term, 1995

STATE OF ALABAMA,

Petitioner,

v.

JAMES WILLIE COCHRAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

The Clerk of this Court originally rejected the Petition for Writ of Certiorari in this case because the Petition was neither timely received nor postmarked by the due date in accordance with this Court's Rule 29.2. The Attorney General attempted to cure this jurisdictional defect by filing the Affidavit of Brenda L. Bell, an employee of the United States Postal Service. The Affidavit is insufficient to cure the jurisdictional defect because the affiant does not state that the "package" addressed to this Court and placed in the United States mail on the due date contained the Petition for Writ of Certiorari relating to this case. The Petition for Writ of Certiorari should be denied for lack of jurisdiction.

INTRODUCTION

The courts below granted James Cochran habeas corpus relief based on overwhelming and undisputed evidence of racial discrimination in the prosecutor's use of peremptory strikes at Cochran's pre-*Batson* trial. This evidence included that prosecutor's own candid and striking testimony that he viewed black jurors as, among other things, "unreliable." Of the thirty-five black jurors known to have been available for service at Cochran's three pre-*Batson* trials, he struck thirty-one. Colleagues from that prosecutor's office testified below that exclusion of black citizens from jury service was a prevalent and accepted practice in Jefferson County, Alabama prior to *Batson*. It is unfortunate that the Attorney General

persists in seeking to preserve a conviction and death sentence so clearly marred by racial prejudice.

This is an important case because it involves a capital sentence, and because it demonstrates that *Batson* was a necessary change in the law. The case is not worthy of this Court's review, however, because the lower courts reached the correct result by application of settled principles of law concerning which this Court's prior decisions have provided clear and adequate guidance. Moreover, as discussed below, the "inconsistent application" rationale on which the Court of Appeals relied in reaching the merits of Cochran's *Batson* claim was but one of many avenues of analysis available to support the judgment. Finally, the unique facts and procedural history of this case – particularly as they relate to the *Batson* claim – make it highly unlikely that the decision below will affect an appreciable number of other cases or litigants.

The sole Question Presented by Petitioner is whether the Court of Appeals erred in concluding that the *Batson* claim "could be reviewed on the merits in Cochran's federal habeas corpus proceeding because the state courts did not consistently apply its procedural bar." The Attorney General contends that the decision below conflicts with this Court's decision in *Dugger v. Adams*, 489 U.S. 401 (1989), and also with the Court of Appeals' prior decisions. As discussed below, however, there is neither tension nor conflict amongst these decisions, and review by this Court is not warranted. We begin by clarifying the procedural history as it relates to the *Batson* claim.

STATEMENT OF THE CASE

From the very beginning of the state proceedings, Cochran's lawyers challenged the State's racially biased use of peremptory challenges. In a written motion filed on February 28, 1977, before Cochran's first trial, Cochran requested that "the District Attorney and his staff be restricted from using their peremptory strikes in a racially biased manner or, in the alternative, that the District Attorney and his staff not be allowed to use the peremptory strikes." R1-3-Tab R-38, at 27. In the motion, Cochran's counsel argued that "[t]he District Attorney and his staff have over a long period of time excluded members of the black race from being allowed to serve on the jury where the issues to be tried involved members of the opposite race." *Id.* Despite the fact that the motion requested only that the prosecutor be restricted from using peremptory strikes in a racially biased manner, it was opposed by the prosecutor, and denied by the trial court. R1-3-Tab R-38, at 90.

The trial court's refusal to restrict the prosecution from racially biased use of peremptory strikes flowed presumably from a prevalent, albeit erroneous, view that racially motivated use of peremptory challenges was permissible under the then-governing law. R1-36, at 22, 45 (testimony of former assistant district attorneys); *Lynn v. State*, 477 So.2d 1365, 1376-77 (Ala. Crim. App. 1985) ("Alabama courts have consistently held that it is not error for the prosecuting attorney to strike a jury on the basis of race."); *but see Ford v. Georgia*, 498 U.S. 411, 420 (1991) (explaining that both *Batson* and *Swain* prohibited racially biased use of peremptory strikes, and that *Batson*

simply altered the quantum of proof necessary to establish a particular claim). Unfettered by the trial court, the prosecutor exercised 24 of 26 strikes in Cochran's first two trials to exclude black members of the venire.

Cochran's counsel reasserted the motion to restrict racially biased striking of jurors at the trial in 1982. Again, the trial court denied the motion. R1-3-Tab R-9, at 539. On direct appeal from the 1982 conviction, and before *Batson* was decided, the Alabama Supreme Court affirmed Cochran's conviction, but remanded for resentencing. *Ex Parte Cochran*, 500 So.2d 1179, 1187 (Ala. 1985). On remand, the trial court resentenced Cochran to death without an evidentiary hearing.

Batson was decided on April 30, 1986, eight days *after* Cochran's counsel filed their brief attacking the resentencing order in the Alabama Court of Criminal Appeals. At that time, Cochran's case was on submission in the Court of Criminal Appeals at a stage in the direct appellate proceedings in which the sole focus was on issues concerning the resentencing proceedings that were the subject of the Alabama Supreme Court's remand. *Cochran v. State*, 500 So.2d 1064 (Ala. 1986) ("The only issue before us is whether the trial court erred in not holding a new sentencing hearing."). Alabama appellate courts have refused to consider "guilt phase" claims when asserted on appeal from a remand proceeding involving only resentencing. *See Giles v. State*, 632 So.2d 568, 576 (Ala. Crim. App. 1992) (citing *Magwood v. State*, 548 So.2d 512, 515 (Ala. Crim. App. 1988)). Cochran's direct appellate counsel testified below that, given the unique procedural posture of the case at the time *Batson* was decided, they knew of no method by which they could place the claim

before the Alabama Supreme Court. R1-20-Volume I, at 36, 212-13. In any event, given the posture of the appeal, the Alabama Supreme Court reviewed *only* the propriety of the trial court's refusal to hold a new sentencing hearing on remand.

Cochran raised the *Batson* issue by written amendment to his Petition for Post-Conviction Relief under Temporary Rule 20. R1-3-Tab R-64. The Attorney General quotes at length from a colloquy that occurred at the post-conviction hearing in which the state trial court expressed the conclusion that the *Batson* claim was procedurally defaulted. *Respondent's (sic) Petition for Writ of Certiorari*, at 10-11 (citing R1-3-Tab R-60, at 22-23) (the *"Certiorari Petition"*). Although conceding that the state trial court ultimately ruled on the merits of the *Batson* claim "in the alternative," the Attorney General nevertheless relies on this colloquy to support the State's argument that the state trial court defaulted the claim.

But the post-conviction hearing transcript does not tell the whole story. In fact, after the post-conviction hearing, the state trial judge contacted Cochran's counsel by telephone, expressing "concern" over the summary disposition of the *Batson* issue, and requested copies of counsels' strike sheets from the 1982 trial. R1-20-Volume I, at 40. Having apparently reviewed this limited evidence, the state trial judge began his discussion of the *Batson* issue in his written opinion with a cryptic disavowal of the very colloquy on which the Attorney General now relies:

> Now to the Batson issue. 'The matter does not appear to me now as it appears to have

> appeared to me then.' From 'Judicature' February-March, 1988 publication.
>
> At the outset of this hearing this Court did not wish to hear the *Batson* motion stating the Court's consideration was precluded. The more this Court thought about this issue, the more consideration of the issue was required.

R1-3-Tab R-61, at 5. The trial court then reviewed the merits and concluded:

> This Court finds that there is no ground nor evidence to justify further hearing on this issue. This Court finds that there was no violation of the *Batson* opinion. This Court finds there was no discriminatory striking of blacks within the criteria outlined by the *Batson* decision . . . .

Id. at 7. The Court of Criminal Appeals affirmed the trial court's rejection of the *Batson* claim on the merits, similarly concluding that "there is nothing in the record to indicate or imply that the State engaged in racial discrimination in the selection of the jury . . . ." *Cochran*, 548 So.2d 1062, 1069 (Ala. Crim. App. 1989).

We raised the *Batson* claim again in the habeas corpus proceedings below. The District Court initially denied discovery on the claim on the ground that the claim was procedurally barred from review, but later concluded that the claim was reviewable because the state courts had decided the claim on the merits. *Appendix to Petition for Writ of Certiorari*, at 27-30. Although the Court of Appeals opted to dispose of the procedural default issue on the "inconsistent application" rationale, it is clear, as discussed below, that the District Court's reasoning provides

an equally compelling basis for affirmance of the judgment below.

The evidence presented to the District Court on the *Batson* claim was undisputed, clear and compelling. The prosecutor from Cochran's 1982 trial admitted that, at the time of Cochran's trial, he believed that black jurors, as a class, were: (i) less "reliable" jurors for law enforcement than white jurors; (ii) more likely to be "distrustful of police" than white jurors; (iii) less likely to recommend the death penalty than white jurors; and (iv) more likely to "identify with" a black defendant than white jurors. R1-36-Volume V, at 33-34. The prosecutor offered no race-neutral explanation for having used seven of his first ten peremptory strikes to exclude all but two of the nine black members of the trial venire. In fact, the prosecutor could not deny that his beliefs about black jurors influenced his selection of Cochran's jury. *Id.* at 38.

Also, two former assistant district attorneys employed by the Jefferson County District Attorney's office during the relevant time period testified that exclusion of black jurors from service was a prevalent and accepted practice in the office at the time of Cochran's trial, particularly in cases involving a black defendant and a white victim. *Id.* at 16, 44. This practice infected Cochran's trial in 1982, just as it had his first two trials, in 1977 and 1978. The Attorney General stipulated in the court below that the prosecutor used 11 of 12 strikes in the 1977 trial and 13 of 14 strikes in the 1978 trial to exclude black jurors from service. *Id.* at 3-11. This general pattern continued at Cochran's 1982 trial.

Again by stipulation, the Attorney General conceded below that: (i) the prosecutor struck black jurors who had given the same answers in voir dire as white jurors whom the prosecutor did not strike; (ii) the prosecutor struck black jurors who provided only responses favorable for the prosecution in voir dire, *i.e.*, that they had been victims of a crime; and (iii) the prosecutor struck one black juror despite the fact that the juror did not respond to any questions during voir dire. R1-36-Volume V, at 3-4; *Petitioner's Motion for Reconsideration and Request to Alter or Amend Judgment and Findings*, at 15-18 (citing state record as to each fact) (the "Reconsideration Motion").[1]

The one black juror who participated in deliberations at Cochran's trial testified in voir dire that: (i) he was personally acquainted with the District Attorney and had played golf with him; (ii) he had served on a jury previously and voted to convict the defendant; (iii) he had been the victim of a crime; and (iv) his son, like the victim, had worked in a grocery store. The prosecutor testified in the District Court that these factors rendered this particular black juror "very satisfactory" to the government. R1-36-Volume V, at 41.

On the basis of this evidence, the District Court granted the writ.

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[1] The Attorney General stipulated in the District Court to the facts set forth in the Reconsideration Motion. R1-36-Volume V, at 3. A copy of the Reconsideration Motion was included at Tab 1 in Appellee's Record Excerpts filed in the Court of Appeals.

SUMMARY OF THE ARGUMENT

In the years following this Court's decision in *Batson*, the courts of Alabama repeatedly excused both trial and direct appellate defaults in order to remedy *Batson* violations that occurred in pre-*Batson* trials. The Attorney General's contention that this case involves a procedural default rule that was applied by the state courts in two out of only three cases is thus misleading and incorrect. We cite below nine examples of cases in which defaults were excused, and there are surely more. This is not an appropriate case, therefore, in which to examine the limits of this Court's suggestion in *Dugger v. Adams*, 489 U.S. 401, 410 (1989) that the "adequacy" of a procedural default rule enforced in the "vast majority of cases" might not be undermined by deviations in, as the Attorney General puts it, a "few cases."

Even if this Court were to accept the Attorney General's myopic focus on the three state court decisions he chooses for comparison, there is still no conflict between the Court of Appeals' decision in this case and *Adams*. *Adams* simply does not stand for the proposition that a default rule applied in a "majority" of cases must be enforced by a federal court. Moreover, as demonstrated below, the Attorney General flatly misstates the holding in one of the three chosen cases – *Morrison v. State* – to support his contention that the procedural default rule at issue has been consistently applied to cases "like Cochran's."

In any event, the sole Question Presented here would in all likelihood not be reached by this Court on review, because the record of the state proceedings demonstrates

that the Alabama state courts resolved the *Batson* claim on the merits, as the District Court held. There is thus no reason in this case to address the consistency, or lack thereof, with which Alabama courts have applied procedural default rules to *Batson* claims.

Finally, the unique procedural history of this case, particularly as it relates to the timing of the *Batson* decision, makes it highly unlikely that the decision below will affect many other litigants. *Batson* has been the law now for almost a decade, and the struggle to remedy *Batson* error from pre-*Batson* trials is nearing an end. In this case, the lower courts were able to remedy a clear *Batson* violation by application of settled principles of habeas corpus jurisprudence.

REASONS FOR DENYING THE WRIT

The doctrine of procedural default in habeas corpus jurisprudence is rooted in the "independent and adequate state law ground" doctrine first enunciated by this Court in defining its certiorari jurisdiction. *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). The principle, put simply, is that a federal court in a habeas corpus proceeding will not disturb a dispositive ruling by a state court rejecting a federal constitutional claim where the state court's judgment rests on state law grounds that are both "adequate" to support the judgment and "independent" of any interpretation of federal law. *Id.* In the habeas corpus context, the rule is grounded on concerns for comity and federalism. *Id.* at 730-31. Application of the rule ensures state courts an opportunity to address federal constitutional

state courts an opportunity to address federal constitutional claims in the first instance, and reflects respect for the states' interest in enforcing local procedural rules in the conduct of criminal proceedings.

A. The Court of Appeals' "Inconsistent Application" Rationale Is Sound, And Does Not Conflict With This Court's Precedents.

To be "adequate" to foreclose federal review, the procedural default upon which the state judgment is premised must be one that is strictly and regularly applied. *Ford*, 498 U.S. at 423-24; *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989); *Johnson v. Mississippi*, 486 U.S. 578, 589 (1988); *James v. Kentucky*, 466 U.S. 341, 348-51 (1984); *Hathorn v. Lovorn*, 457 U.S. 255, 263-65 (1982); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); *Messer v. Florida*, 834 F.2d 890, 893 (11th Cir. 1987); *Spencer v. Kemp*, 781 F.2d 1458, 1470-71 (11th Cir. 1986); *Francois v. Wainwright*, 741 F.2d 1275, 1281 (11th Cir. 1984). There is more than ample support for the Court of Appeals' conclusion that trial and direct appellate procedural default rules have not been strictly or consistently applied to *Batson* violations in the Alabama courts, particularly those *Batson* claims arising from capital trials conducted before *Batson* was decided. *See, e.g., Watkins v. State*, 632 So.2d 555 (Ala. Crim. App. 1992) (collecting cases).

Indeed, in the aftermath of *Batson*, the courts of Alabama routinely disregarded procedural obstacles to correcting *Batson* error that occurred at pre-*Batson* trials. *See, e.g., Ex parte Floyd*, 571 So.2d 1234, 1236 (Ala. 1990) (in context of state post-conviction proceeding, Alabama

Supreme Court remands to trial court for *Batson* hearing despite procedural default on direct appeal); *Lynn v. State*, 543 So.2d 704, 706 (Ala. Crim. App. 1987) (Alabama Court of Criminal Appeals remands for *Batson* hearing on recommendation of Attorney General); *Hemphill v. State*, 571 So.2d 365, 367 (Ala. Crim. App. 1990) (in non-capital case, Court of Criminal Appeals remands for *Batson* hearing without discussing procedural default); *Ex parte Bankhead*, 585 So.2d 112, 117 (Ala. 1991) (On Application for Rehearing) (on direct appeal, Alabama Supreme Court remands for *Batson* hearing under plain error rule where no objection was raised at trial); *Walker v. State*, No. 7 Div. 164, slip op. at 3 (Ala. Crim. App. July 26, 1991) (remand for *Batson* hearing under plain error rule where *Batson* issue raised for first time on direct appeal).

Given the prevalent misconception in the Alabama courts prior to *Batson* that race-based use of peremptory challenges was constitutional, the Alabama courts were particularly aggressive in the years following *Batson* in reaching out to protect the rights of capital defendants where *Batson* error appeared in the record of a pre-*Batson* trial. *See, e.g., Bankhead*, 585 So.2d at 117 (on application for rehearing, Court remands for *Batson* hearing); *Ex parte Adkins*, 600 So.2d 1067, 1068-69 (Ala. 1992) (remand for *Batson* hearing); *Ex parte Godbolt*, 546 So.2d 991, 998-99 (Ala. 1987) (remand for *Batson* hearing "[a]lthough the matter was not called to our attention by counsel"); *Guthrie v. State*, No. 7 Div. 287, slip op. at 2 (Ala. Crim. App. June 12, 1992) (remand for *Batson* hearing where "appellant neither raised this issue in the trial court nor argued it on appeal"); *Walton v. State*, 523 So.2d 134 (Ala. Crim. App.), *cert. denied*, No. 86-829 (Ala. 1987) (remand for

Batson hearing on application for rehearing). The courts of Alabama spoke clearly during these years, by aggressive, indeed extraordinary application of the "plain error" rule and, where necessary, by simple disregard of procedural default rules altogether. *See, e.g., Floyd*, 572 So.2d at 1236. Given that the courts of Alabama opted repeatedly to excuse procedural defaults in order to remedy *Batson* violations from pre-*Batson* trials, it cannot fairly be said that the courts below showed any disrespect to the courts of Alabama by proceeding to the merits of Cochran's *Batson* claim.

In its opinion, the Court of Appeals focused primarily on *Floyd* and *State v. Tarver*, 629 So.2d 14, 18-19 (Ala. Crim. App. 1993). In *Tarver*, the Alabama Courts of Criminal Appeals ruled that a *Batson* claim raised for the first time at the post-conviction phase had been procedurally defaulted on direct appeal. The *Tarver* Court distinguished *Floyd* on the ground that no *Swain* objection had been raised at Tarver's trial. *Tarver*, 629 So.2d at 19. The Court of Appeals noted in its analysis below that this case is like *Floyd*, and not like *Tarver*, because Cochran's counsel made a *Swain* objection at his trial.

The Attorney General argues here, as he did on application for rehearing below, that a third case, *Morrison v. State*, 551 So.2d 435 (Ala. Crim. App. 1989), shares the procedural characteristics of both *Cochran* and *Floyd*, in that *Morrison* involved a pre-*Batson* trial at which a *Swain* objection was raised. Given that the *Morrison* court rejected the *Batson* claim on procedural default grounds in the state post-conviction proceedings, the Attorney General posits that the courts of Alabama have indeed applied its procedural default rules "consistently" – at

least in two out of three cases in which a *Swain* objection was made at trial prior to a direct appellate default of a *Batson* claim. This argument does not warrant this Court's consideration for several reasons.

First, the "two out of three" argument is grounded in the false premise that a procedural default rule can be "adequate" despite widespread inconsistent application so long as the rule is applied marginally consistently to an isolated triad of cases sharing similar procedural histories. As discussed above, the cases are legion in which the Alabama courts excused both trial and direct appellate defaults to address *Batson* error arising from pre-*Batson* trials. There is simply no support, and the Attorney General points to none, for the proposition that "relevant" cases for purposes of analyzing consistency of application are limited to those sharing like procedural histories.

The second flaw in the "two out of three" rationale is that it proceeds from the premise that the Alabama courts defaulted the *Batson* claim in the *Morrison* case despite knowing that a *Swain* objection had been raised at Morrison's trial. The Attorney General fails to point out, however, that the Alabama Court of Criminal Appeals was apparently unaware that a *Swain* objection had been raised at Morrison's trial. *Morrison*, 551 So.2d at 437 ("There was no objection to [the prosecutor's use of peremptory strikes] *at trial* or on direct appeal." (emphasis added)). Thus, the decision in *Morrison* lends no support to the Attorney General's contention that the Alabama courts have been consistent in rejecting *Batson* claims in cases he deems "like Cochran's."

Even if this case were as the Attorney General presents it, there would be no conflict with *Adams*, or with the Court of Appeals' prior decision in *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989). This Court did not hold in *Adams* that the failure to enforce a procedural default rule in a "few cases" should be disregarded, or that a rule enforced in the "vast majority of cases" is "adequate" *per se*. Neither did the Court of Appeals so hold in *Delap*. In fact, in neither case did the majority acknowledge *any* deviation by the state courts in application of the relevant procedural default rule. *Adams*, 489 U.S. at 410 n.6; *Delap*, 890 F.2d. at 300. Instead, in both cases the majority concluded that the alleged examples of "deviation" by the state courts were either unclear or misinterpreted by the habeas corpus petitioner. *Id.* Neither *Adams* nor *Delap*, then, can fairly be read as establishing that state procedural rules applied in a "majority" of cases are "adequate" to bar federal review.

In fact, this Court has suggested that a single deviation from enforcement of a procedural rule undermines "adequacy," if the deviation occured under circumstances similar to that presented in the case under review. *Hathorn*, 457 U.S. at 264 ("[t]he striking similarity between *Quinn* [in which the procedural default rule was not enforced] and this case . . . persuades us that the Mississippi Supreme Court is not 'strictly or regularly' following [the relevant procedural rule] . . . ."); *see also Wheat v. Thigpen*, 793 F.2d 621, 626 (5th Cir. 1986) (finding inconsistent application on the basis of a single state court decision); *Wilcher v. Hargett*, 978 F.2d 872 (5th Cir. 1992) (same). Thus, the weight of authority, including this

Court's prior decisions, supports the Court of Appeals' rationale. There is thus no conflict in the decisional law.

B. The District Court's "Clear and Plain Statement" Rationale Provides An Independent Basis For Affirmance Of The Court Of Appeals' Decision.

State court decisions often contain mixed discussions of federal (substantive) and state (procedural) grounds for decision, as in this case. In such cases, this Court has developed and applied a conclusive presumption – referred to as the "clear and plain statement" rule – to determine whether the state procedural ground for decision should foreclose federal review of a constitutional claim. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (articulating the rule in the context of certiorari jurisdiction); *Harris v. Reed*, 489 U.S. 255, 263 (1989) (extending the rule to habeas corpus proceedings). The rule provides that federal courts will presume that there is no independent and adequate state ground for a decision where the decision "fairly appears to rest primarily on federal law or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Coleman*, 501 U.S. at 735 (quoting *Long*, 463 U.S. at 1040-41).[2]

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[2] In *Coleman*, this Court made clear that the *Harris* presumption "applies only when it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for the decision." *Id.* at 739. *Coleman* thus

The Alabama Court of Criminal Appeals' decision here presents a classic case for application of the *Harris* presumption, as the District Court held. The court's extensive discussion of the factual merit of Cochran's *Batson* claim, and its conclusion that there was "nothing in the record to indicate or imply that the State engaged in racial discrimination in the selection of the jury" plainly demonstrate that the decision rested primarily on federal law. Moreover, the discussion of procedural default contained in the opinion is itself "interwoven with federal law." The court stated plainly that application of the alleged procedural default depended on the court's view that the claim lacked merit. *Cochran*, 548 So.2d at 1068 ("Although Cochran has been sentenced to death, the alleged error in this case is not 'plain' as we have indicated above.").

The Attorney General argues here, as he did below, that the following text, carefully excised from the State court's extensive discussion of the merits, constitutes a "clear and plain statement" within the meaning of *Harris:*

> Under the circumstances present, Cochran is procedurally barred from relief on his claim that the State actually used its peremptory challenges in a racially discriminatory manner in violation of *Batson, supra*. As we have observed, that issue could have been raised on direct appeal. A petitioner will not be given relief

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made clear that there is no requirement of a "clear and plain statement" in cases involving state court summary affirmances or dismissals that contain no federal law component, and that clearly rest on a state procedural ground. *Id.* at 739-44; *see also Ylst v. Nunnemaker*, 501 U.S. 797 (1991).

> under . . . [Rule 20] based upon any ground which could have been but was not raised on appeal.

Id. at 1067-68 (citations omitted). The Attorney General argued below that the quoted text clearly and plainly demonstrates that the Court of Criminal Appeals' extensive merits discussion was simply an "alternative" holding, which is permissible under the *Harris* test.

But the language the Attorney General cites does not constitute a "clear and plain statement" within the meaning of *Harris*. The text includes nothing to support the contention that the alleged procedural bar was "adequate" to support the judgment, or was "independent" of federal law. To the contrary, the procedural default paragraph is preceded by a detailed discussion of the merits of the claim, and the paragraph itself begins with the phrase "under the circumstances present," which ties the procedural default paragraph to the merits discussion. Moreover, the discussion that follows the Attorney General's favored paragraph reveals plainly that the alleged default would not have been sufficient itself to bar relief, had the *Batson* claim been found to have merit. The court's concluding paragraph demonstrates that its ruling was driven primarily by its view that the record contained nothing "to indicate or imply that the state engaged in racial discrimination in the selection of the jury." *Cochran*, 548 So.2d at 1069. This, we now know, was simply incorrect.

Where, as here, a state court's procedural default finding is interwoven with the merits of a federal constitutional claim, the "clear and plain statement" rule requires something more than the mere recitation that a

procedural default occurred. *Harris*, 489 U.S. at 264 n.10 (state courts are free to reach merits of federal claim as "alternative" holding "as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision."). In the words of the District Court, "it is impossible to determine whether a state ground for decision is adequate if the state court does not clearly indicate that it is *independently* relying on that ground." R1-31-12 (emphasis added). In *Coleman*, this Court articulated the principle succinctly:

> After *Long*, a state court that wishes to look to federal law for guidance or as an alternative holding while still relying on an independent and adequate state ground can avoid the presumption *by stating 'clearly and expressly that [it's decision] is . . . based on bona fide separate, adequate and independent grounds.'*

Coleman, 501 U.S. at 733 (quoting *Long*, 463 U.S. at 1041) (emphasis added). Thus, it is "the *adequacy* and *independence* of any possible state law ground" that must be expressed "clearly" and "plainly" – not simply the fact of a default. *Id.* (quoting *Long*, 463 U.S. at 1040-41) (emphasis added).

The Court of Criminal Appeals reviewed the merits of Cochran's *Batson* claim under the "plain error" rule. Plain error review commonly occurs only on direct review, and the very purpose of the plain error rule is to identify those claims as to which otherwise applicable procedural defaults are to be excused. Thus, the very nature of the Court of Criminal Appeals' merits discussion reveals that the procedural default finding was

dependent on the court's merits ruling.[3] Whatever the Court of Criminal Appeals' intentions, it is clear from the opinion that the court would have granted relief, and thus excused any procedural default, had it found Cochran's *Batson* claim to have merit.

Where a state court reaches the merits of a claim under the "plain error" rule, federal review is not barred. *See Engle v. Isaac*, 456 U.S. 107, 135 n.44 (1982) ("If Ohio had exercised its discretion to consider respondents' claim [under the plain error rule], then their initial default would no longer block federal review."); *Hargrave v. Dugger*, 832 F.2d 1528, 1539 (11th Cir. 1987) (Tjoflat, J., specially concurring) (habeas corpus review not barred where state court elects to address merits of claim under "plain error" rule); *Rogers-Bey v. Lane*, 896 F.2d 279, 281 (7th Cir. 1990) (same); *Walker v. Endell*, 850 F.2d 470, 473-74 (9th Cir. 1987) (federal review permitted where claim was "reviewed by a state appellate court on the merits for plain error."); *Huffman v. Ricketts*, 750 F.2d 798, 800-01 (9th Cir. 1984) (federal review required where state

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[3] The court's willingness to engage in "plain error" review at the collateral stage flowed presumably from the fact that *Batson* had been decided at a point in the direct appellate stage at which the parties were precluded from raising issues other than those arising from the resentencing proceedings. *Giles*, 632 So.2d at 576. The Alabama appellate courts' "plain error" review on direct appeal occurred prior to this Court's decision in *Batson*, and Cochran had no real opportunity to raise the claim on direct appeal thereafter. This is yet another ground on which the Court of Appeals' judgment could be affirmed. *See Johnson*, 486 U.S. at 587-89 (procedural default rule not "adequate" where rule would require assertion of claim in forum where claim could not be heard).

court entertains merits of procedurally defaulted claim to determine whether claim constitutes "fundamental error"); *U.S. ex rel Gibson v. McGinnis*, 773 F. Supp. 126, 131-32 (C.D. Ill. 1991) ("A state court's examination of the merits of a federal claim – even if only to determine whether it would be fair to impose a state procedural bar – constitutes sufficient predicate to apply the *Harris* presumption.").

The Harris presumption is triggered "when the *adequacy* and *independence* of any possible state law ground is not clear from the face of the opinion." *Coleman*, 501 U.S. at 735 (quoting *Long*, 463 U.S. at 1040-41) (emphasis added). The Attorney General can point to no word or phrase in the opinion of the Court of Criminal Appeals to support his contention that the court's merits discussion was truly an "alternative" holding. The District Court thus correctly concluded that the *Batson* claim was subject to review, and this rationale provides an independent basis for affirmance of the judgment below.

CONCLUSION

Racial discrimination in the selection of jurors " 'casts doubt on the integrity of the judicial process . . . and places the fairness of the criminal proceeding in doubt." *Powers v. Ohio*, 499 U.S. 400 (1991) (citations omitted). "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection

because it denies him the protection that a trial by jury is intended to secure." *Batson*, 476 U.S. at 86. "The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." *Turner v. Murray*, 476 U.S. 28, 35 (1986).

These words reflect this Court's unwavering commitment to the promise of *Batson*. James Cochran respectfully requests that this Court deny the Petition for Writ of Certiorari, so that he might enjoy the benefit of that promise.

Respectfully Submitted,

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